(21)

No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC.,

Petitioner,

—*vs.*—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER TEXACO INC.

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August 3, 1989

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QUESTIONS PRESENTED

1. Whether the Robinson-Patman Act is violated if a manufacturer merely sells to wholesalers at a lower price than to retailers (so as to enable wholesalers to perform their role of reselling to retailers and earn a profit), unless the manufacturer selling to both levels of trade (wholesale and retail) either:

> (a) Discriminates in price among its wholesalers, selling to each wholesaler at a price that would only cover the particular wholesaler's costs (assuming they were determinable), or
>
> (b) Otherwise polices and controls each wholesaler's prices to its retailer customers to assure that the wholesaler does not resell to retailers at a lower price than the manufacturer?

2. Whether the *Morton Salt* "self-evident" inference of injury to competition from sales over time to competing customers at different prices (334 U.S. at 50) has any application to the age-old practice of selling to wholesalers at lower prices than to retailers?

3. Under the Robinson-Patman Act and Section 4 of the Clayton Act, where the allegedly favored customer is a wholesaler, the allegedly disfavored customer a retailer, and the purported illegal price discrimination is a discount given to all wholesalers, may the retailer predicate injury and recover treble damages on the basis of how much better off he would have been had he too received the wholesaler discount, in whole or part?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were petitioner Texaco Inc. and respondents Ricky Hasbrouck, d/b/a Rick's Texaco, James O. Sills, Alva N. Blue, John W. Bevan, Ricky A. Rigg, Gene C. Robinson, Mollie J. Robinson, Albert E. Allen, Harold C. Hardwick, Henry Rigg, Vincent Lies, and Ralph O. Webber.

The affiliates and subsidiaries of Texaco Inc. listed on its most recent Form 10-K filed with the Securities and Exchange Commission are as follows:

Getty Oil Company
Riverway Gas Pipeline Company
Texaco Pipeline Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
The Texas Pipe Line Company
Deutsche Texaco AG
Norsk Texaco Oil A/S
S.A. Texaco Belgium N.V.
S.A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.-Productos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.

Texaco Petroleum Company
Texaco Trinidad, Inc.
Texaco Petroleum Company
Texaco Butadiene Company
Texaco Chemical Company
Texaco Canada Inc.
Texaco Canada Resources Ltd.
Texaco Canada Resources
Getty Marine Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

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BRIEF OF PETITIONER TEXACO INC.

OPINIONS BELOW

The Amended Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 842 F.2d 1034 and is reprinted as Appendix A to the Petition. The Opinion of the United States District Court for the Eastern District of Washington is reported at 634 F. Supp. 34, and is reprinted as Appendix B to the Petition.

JURISDICTION

The original Opinion of the Court of Appeals for the Ninth Circuit was entered on October 26, 1987. Following a timely petition for rehearing, the court of appeals entered an Amended Opinion on March 17, 1988 and denied the petition for rehear-

ing on that date. The Order denying the petition for rehearing is set forth as a preface to the Amended Opinion. (PA-4).[1]

The Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1). Certiorari was granted on June 12, 1989.

STATUTORY PROVISIONS INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

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1 References to "PA" are to Petition for Certiorari Appendix A, the Court of Appeals Opinion; references to "PB" are to Petition for Certiorari Appendix B, the District Court Opinion; references to "JA" are to the Joint Appendix; references to "R." are to the reporter's trial transcript.

STATEMENT OF THE CASE

Respondent Hasbrouck and eleven other retail service station dealers ("Hasbrouck" or "plaintiffs") in the Spokane area were awarded treble-damages under § 4(a) of the Clayton Act, 15 U.S.C. § 15(a), because their supplier, Texaco Inc. ("Texaco"), also sold Texaco-brand gasoline in the same area to a wholesaler, John Dompier Oil Company ("Dompier"), at a wholesale discount of 2.65 to 3.95 cents per gallon below the per gallon price to direct-buying retailers. The damages covered nine years from January 1972 through April 1981, and encompassed two periods: a later one during which the wholesaler itself operated some retail stations, and an earlier one during which it did not. Plaintiffs gave the jury damage estimates that combined both periods and precluded differentiation between them. JA 353-54. No distinction was made between Dompier's employee-operated stations (when they existed) and Dompier's independent retailer customers for purposes of establishing injury to competition and other elements of the offense. PB-6, n.6.

For the period Dompier was solely a wholesaler, liability under § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), was premised on the view that a supplier selling to wholesalers at a uniform wholesaler price and to retailers at a uniform higher retailer price becomes guilty of illegal price discrimination (a) if one of its wholesalers chooses to pass on a portion of its margin to a retailer, and (b) if that retailer, in turn, chooses to pass on some of that margin to consumers, and (c) if the lower consumer price may be detrimental to a plaintiff retailer who competes with the wholesaler's retailer-customer. The jury was instructed that the requisite competitive injury could be inferred from the fact that wholesalers paid substantially less than retailers for a long time. It was allowed to base damages on how much better off the plaintiff retailers would have been had they too received the wholesaler discount, the premise being that plaintiff retailers were entitled to price parity, not with the wholesaler's retailer customers, but with the wholesaler itself.

To sustain the verdict, the courts below adopted these theories of discrimination, injury to competition and damages. Manufacturers wishing to avoid potentially massive liabilities to direct-buying retailers are instructed by the court of appeals that henceforth they must either tailor their wholesaler price to each wholesaler's costs (to make it financially impractical for any wholesaler to reduce prices)[2] and/or otherwise make certain that its wholesalers do not pass on any of their margin to retailers who might compete with direct-buying retailers:

> "That all wholesalers were offered the same discount would be an appropriate defense in a case where the plaintiff and the other customers of the defendant were all wholesalers performing at the same level in the chain of distribution. *Here, however, only the other customers are wholesalers; the plaintiffs are retailers* who are further down the chain of distribution. The injury occurs at the latter level and results from the receipt by wholesalers of a functional discount in excess of the value of the services they perform, all or a portion of which they then pass on to the retailers they supply.
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> • • •
>
> Despite the fact that Dompier and Gull, at least in their capacities *as wholesalers, did not compete directly with Hasbrouck*, a section 2(a) violation may occur if (1) *the discount they received was not cost-based* and (2) *all or a portion of it was passed on* by them to customers of theirs who competed with Hasbrouck." PA-7-8 (emphasis added).

2 Any price reduction by a wholesaler was viewed below as demonstrating that the wholesaler should have been charged more by the supplier:

> ". . . had the amount of the discounts been merely reimbursement for the value of the services performed by the favored buyers, it is improbable that the discounts (or a portion) could have been passed along and been reflected in the retail price. Consequently, the price differential and its resultant impact on competition cannot be legitimized under the rubric of functional discount." PB-6.

I. Statement of Facts

A. The Competitive Context

The Spokane, Washington, retail gasoline market concededly was highly competitive throughout the relevant period. JA 37, 54, 110-13, 253-54, R. 419, 1205-06, 1227-28. In addition to plaintiffs and the Dompier-supplied stations, the market was served by numerous major brand gasoline stations (including other Texaco stations, JA 20). The period was also characterized by the entry of many new independent brand gasoline marketers operating low overhead, low price and high volume stations, and by the related introduction and growing market acceptance of self-service stations (customer pumps gasoline) and mini-service stations (attendant pumps gasoline but customer performs other services, *e.g.*, inserting motor oil). JA 62-63, 64, 175-77, 206, R. 753, 917-19. The latter were in contrast to the traditional full service stations, which most plaintiffs operated, where dealers sold gasoline and also provided mechanical repair services, lubrication and oil changes, towing services and tires, batteries and automotive accessories ("backroom sales"). JA 44, R. 1118-20. Plaintiffs acknowledged that the market demanded a 4-cent to 8-cent retail price differential between self-service and full service gasoline. JA 205-06, R. 283-84, 752-53, 1857-61. In addition, plaintiffs generally priced gasoline several cents above the market. R. 910-11.[3]

1. The Texaco Brand and Wholesaler Gull

As many lower-priced non-Texaco brand competitive service stations were nearer to plaintiffs than Dompier-supplied Texaco stations, plaintiffs predicated their claims for damages on the existence of such a degree of customer loyalty to the Texaco brand as to cause their profits to be measurably impacted by

3 Hasbrouck, for example, explained he increased his margin (the difference between his buying and selling price) over the period, and, if he "needed a little extra money," would raise it higher. JA 259. Plaintiff Sills believed he was often the highest priced dealer in Spokane, with a margin that ran as high as 13 cents. R. 665-66, 674, 682. *See also* R. 359-62 (Bevan); R. 601 (Blue); R. 1245-46, 1270 (Hardwick); R. 1297, 1331-32 (Webber).

changes in price at Dompier-supplied stations, regardless of their remoteness and the proximity of other low-price competition. JA 285-87, 299-300, R. 1873.[4] Accordingly, damages were not claimed with respect to Texaco's gasoline sales to another wholesaler, Gull Oil Company ("Gull"), because Gull did not market under the Texaco brand. JA 24 ¶ 9, 304, R. 1715-16, 3061-65. Plaintiffs acknowledged that consumers did not know Gull was selling product purchased from Texaco (R. 1716) and, indeed, Hasbrouck testified that even he was not so aware, and never noticed his customers at Gull stations. JA 256. Since no Gull station was claimed to have caused compensable damages to any plaintiff, Texaco's sales to Gull are without present significance.[5]

B. The Period of Retail Operations By Dompier

In July 1974, 30 months into the damage period, a station that had been supplied by Dompier as wholesaler (303 Third Avenue), was bought by Dompier's then president, Neil Dompier, leased to Dompier and, thereafter operated by Dompier's employees. JA 152-55, 182-83. A year later, in July 1975, Neil's father John bought two other stations that had been supplied by Dompier as wholesaler (N. 502 Freya; N. 3306 Monroe), and similarly leased them to Dompier for operation by Dompier employees. JA 153, 163-64.[6] In 1978, a fourth station that was a

4 Hasbrouck, for example, claimed he was caused competitive problems by a Dompier-supplied station "clear across town" (R. 1569), notwithstanding that 75% of his customers came from his immediate neighborhood (R. 1564) and that other competitive stations, including plaintiff Allen's low-priced Texaco-brand station, were much closer. (R. 1569, 1574).

5 The district court declined to exclude Gull from consideration by the jury. R. 3071. The jury was expressly permitted to rest findings on such issues as a plaintiff's competition with a "favored" purchaser exclusively upon Gull-supplied stations, notwithstanding that compensable damages were sought solely as to Dompier-supplied stations. JA 383, 390, 395-96, 397-99, 399.

6 A major reason for taking over these stations was that their prior owner, Koziuk, was "bootlegging" non-Texaco gasoline, commingling it with what he bought from Dompier and selling it as "Texaco" gasoline at these stations at low prices. Dompier increased the retail price at these stations when they were acquired. R. 898-900. Plaintiffs assertedly were injured by Koziuk's prior low prices. Virtually all customers called by plaintiffs to testify to patronage diversion specified the low prices at Koziuk stations. *See, e.g.*, R. 479, 484-85 (Green), R. 636-37 (Hardin), R. 1330-31 (Scroggin), R. 1345 (Mottaz), R. 1587 (James), R. 1596 (Town), R. 1602-03 (Rouse).

customer of Dompier (N. 2924 Market) similarly was acquired and converted to Dompier employee operation. R. 914. Plaintiffs' damage claim for the full 1972-81 period rested on these four stations, each of which was self- or mini-service. R. 1739-41, 2933-34, 3061-63.

From July 1975 to the end of the damage period in 1981, plaintiffs' damages were predicated solely upon Dompier's *retail* operations at these stations (the first three stations to 1978, and then all four). R. 2940-47. As plaintiffs explained, they disregarded Dompier's continuing wholesale sales to independent retailers because generally they were at prices that were not below those Texaco charged plaintiffs. R. 1938-40, 2942, 2949-50. The period of Dompier-as-retailer damages began with July 1975 (42 months into the damage period) because, according to plaintiffs' economic expert, before that date Dompier "was not yet . . . substantially a retailer of gasoline." R. 1939.

C. The Period Dompier Was Only A Wholesaler

All other damages claimed by plaintiffs were based upon Dompier's purchases and sales as a wholesaler.[7] In this capacity, Dompier's functions included: persuading accounts to purchase gasoline and other products from it; handling billing; extending credit; carrying accounts receivable; maintaining

7 Two car wash-service station facilities owned by Red Carpet Service, Inc., a corporation owned by John Dompier, bought gasoline from Dompier during this time. JA 181. As car washes, these facilities charged gasoline prices higher than those charged at the average major brand full-service station. R. 1143-44. Plaintiffs explicitly disclaimed seeking compensable damages as to the Red Carpet stations. R. 1863-66.

trucks[8], a warehouse and bulk storage facilities; evaluating the purchase and lease of properties for service stations; employing sales and office personnel and facilities; and providing sales promotions and related services to its customers. R. 929-35, 942-44. It was an Admitted Fact (No. 7) that:

> "Throughout the relevant time period, the prices Dompier charged to the retail service stations and car washes to which Dompier supplied gasoline were set by Dompier." JA 369.

Dompier's President testified that Texaco did not interfere in Dompier's pricing.[9] R. 895. He further confirmed that throughout the period from 1970 through 1981, Dompier "sold gasoline to different dealers at different prices on or about the same day." R. 946.

Similarly, the retail service station operators buying Texaco gasoline from Dompier made their own independent determinations about the prices at which they would sell to the public, without interference from Dompier or Texaco. R. 895-96. Some of these customers, including the four stations that subsequently became Dompier-operated, sought to compete on the low-overhead, minimal-service and low-price basis characteristic of new service station competition in Spokane at the time. JA 175-77, R. 917-19.

Plaintiffs acknowledged that Texaco's price to Dompier would not affect them unless (a) Dompier independently chose

8 Dompier was paid a hauling allowance to pick up gasoline from Texaco's terminal and haul it to Dompier's bulk plant. Rather than trucking it to the bulk plant, and rehauling it from there to the customers, Dompier generally would try to make several deliveries directly from Texaco's terminal. Dompier did not believe the hauling allowance fully covered its delivery expenses. R. 1142.

9 At the time of testimony, Dompier no longer was a Texaco distributor but a Conoco distributor. R. 944. Dompier received a covenant not to sue from plaintiffs prior to being called as a witness by them. R. 857.

to pass along some portion of his wholesale margin to a retailer and (b) the retailer independently chose to further pass some portion to the public. Even if Texaco increased its price to Dompier, plaintiffs' sales would not necessarily increase because it still would depend upon what Dompier's retailers decided to do. R. 1979.

Thus, plaintiffs' damages varied over the 1972-75 period and depended not on anything done differently by Texaco, but on what Dompier and its customers did. For example, plaintiffs concluded they had no damages between October 1974 and July 1975:

> "During that particular period the Dompier supplied stations were, in fact, paying a price equal to or on occasion greater than what the plaintiffs paid." JA 302.[10]

Nothing about Texaco's uniform wholesaler price compelled Dompier to one day raise its prices to some customers and cut prices to others, and to do something different the next day. Plaintiffs' economist made no attempt to relate Dompier's prices to Dompier's costs: it apparently could not have been done from Dompier's profit and loss statements and would have required a separate study. R. 1956-57.[11]

D. Damages for the Period Dompier Was Only A Wholesaler

For purposes of damages, plaintiffs did not claim they were entitled to be treated like Dompier's customers, their alleged competitors, but rather like Dompier itself, the wholesaler. Plaintiffs did not link the amount of their claimed damages to the portion of the wholesaler discount that allegedly exceeded

10 This was the situation, plaintiffs' economist stated, for many other time periods as well. R. 2947-49. Exhibit 5401 shows that between February 1974 and June 1979, plaintiffs paid Texaco less than, or the same as, the prices paid by Dompier's retail customers to Dompier at least 82% of the time. Def. Ex. 5401; R. 2721.

11 Nor did the district court believe it warranted to allow Texaco to seek to establish Dompier's costs at trial. R. 1134.

Dompier's costs. They did not predicate damages on the average of the price reductions received by Dompier's customers or even the maximum price reduction received by any Dompier customer. Nor, of course, did they predicate them on whatever fraction of that amount Dompier's customers may have actually passed on to the public by way of the price reductions that purportedly injured plaintiffs.

Plaintiffs' damages, instead, were constructed on the assumption that Texaco was given a hypothetical order in January 1972, effective immediately, to charge the identical price to wholesaler Dompier and retailer plaintiffs. Assuming such an inconceivable order,[12] plaintiffs postulated three basic scenarios: Dompier pays the retailer price; plaintiffs pay the wholesaler price; or Dompier's price goes up halfway and plaintiffs' comes down halfway. For each of these possibilities, plaintiffs' economist calculated plaintiffs' hypothetical profits under two assumptions: either all or half the price difference is passed on by Dompier and plaintiffs. His 1972-1981 total for each plaintiff under each of these six assumptions constituted plaintiffs' quantification of their damages.[13] In addition, the jury was given a number for each plaintiff for the full period representing straight quantification of "automatic damages," *i.e.*, multiplication of the total gallons each plaintiff purchased by the amount of the wholesaler discount. Pl. Ex. 912; R. 1722, 1723; R. 1725.[14]

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12 It would destroy the wholesaler's investment and business, compel discrimination against the wholesaler's customers, and require discrimination in favor of plaintiffs as against other Texaco retailers. Facing such an order, a supplier would wish to consider discontinuing business completely with at least one class of trade—retail or wholesale.

13 *See* Pl. Ex. 913; R. 1755; Pl. Ex. 914; R. 1756, 1758; Pl. Ex. 915; R. 1761; Pl. Ex. 916; R. 1761; Pl. Ex. 917; R. 1762, 1763; Pl. Ex. 918; R. 1762, 1763.

14 "Automatic damages" are not recoverable as a matter of law. J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 561 (1981). Nonetheless, the district court, in its opinion denying Texaco's motion for judgment n.o.v., held that the danger "the jury would automatically award damages based upon the amount of discrimination, was alleviated by the court's oral admonitions and instructions to the jury," and upheld its decision to admit Exhibit 912. PB-15-16.

Damages calculated on the basis of having the "Price Discrimination Eliminated by Texaco Increasing Dompier's Purchase Price to Plaintiffs' Purchase Price" totalled $231,197.70, including amounts for "Lost Profits from Backroom Sales." Pl. Ex. 914; R. 1756. The aggregate jury award was close to twice as much. JA 11-12. The jury plainly took the opportunity given it to base damages on how much better off the retailers would have been had they been "favored" over Dompier's retailer customers and other Texaco retailers and received the wholesaler discount.

II. Prior Proceedings

The Complaint was filed on January 30, 1976. Following trial in the United States District Court for the Eastern District of Washington in which the jury found for plaintiffs, the district court (per Callister, J.), on March 26, 1980, granted Texaco's motion for judgment n.o.v. *Hasbrouck* v. *Texaco Inc.*, 1980-2 Trade Cas. (CCH) ¶ 63,343 (E.D. Wash. 1980). It did so because plaintiffs, notwithstanding this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), chose to confine their evidence to "automatic damages" pursuant to the Ninth Circuit's pre-*Brunswick* opinion in *Fowler Mfg. Co.* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). The district court correctly recognized that *Brunswick* had effectively undermined *Fowler*. By the time of the appeal, this Court too had expressly rejected "automatic damages" on the basis of *Brunswick* in *J. Truett Payne Co., Inc.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981). In *Hasbrouck* v. *Texaco Inc.*, 663 F.2d 930 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982), the Ninth Circuit acknowledged that "*J. Truett Payne* confirms the trial court's ultimate conclusion . . ." (663 F.2d at 932) and that "the Supreme Court relied upon *Brunswick* in deciding *J. Truett Payne* . . . ." (663 F.2d at 933 n.1). Nonetheless, it remanded for a new trial, con-

cluding that the district court erred by considering *Brunswick* and not adhering to *Fowler* until it was expressly overruled.

In determining the scope of the new trial upon remand, the court of appeals excluded two issues it had decided in plaintiffs' favor (663 F.2d at 933): one, relating to the effect of federal mandatory gasoline pricing decisions; the other relating to the jurisdictional prerequisite to a Robinson-Patman claim that " 'at least one of the two transactions which, when compared, generate a discrimination . . . cross[es] a state line.' " *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974).[15]

At the new trial, which commenced before Judge Quackenbush on June 4, 1985, the damage period was extended to cover 1972 through 1981. Plaintiffs conceded (in the context of a discussion of the "meeting competition" defense) that if Texaco's conduct was lawful for any portion of the 1972-1981 period—including the period before July 1974 when Dompier functioned solely as a wholesaler—judgment was to be entered for Texaco. JA 353-54. The district court, while expressing skepticism about plaintiffs' election to seek (and not break out) damages for the period Dompier had no salary-operated stations,[16] allowed the case to proceed on that basis. The district court denied motions for judgment notwithstanding the verdict

15 There is no dispute that the sales to plaintiffs and Dompier were all within Washington State. Notwithstanding *Copp*, the court of appeals held the jurisdictional requirement satisfied because "of a national exchange agreement between [Texaco] and another refiner covering the gasoline involved . . . ." (663 F.2d at 934)—*i.e.*, on the interstate commerce involved in Texaco's *acquisition* of gasoline rather than the local nature of its *sales* to the "favored" and "disfavored" purchasers. Texaco and other oil companies obtained gasoline from Exxon in Spokane.

16 *See, e.g.*, JA 315 (". . . there were no salary operated stations prior to '74 . . . they are not broken out, I might say."); JA 316 ("my concern is the Dompier supplied, nonsalaried sales, where in fact he is selling as a wholesaler"); JA 319 ("Is Texaco supposed to say to its wholesaler who is selling to Koziuk you have to sell that at the same price we are selling to the plaintiffs?"); JA 320 ("Are you saying that Texaco sets its price based upon whatever Dompier is charging Koziuk?").

or a new trial (Petition Appendix B) and judgment was entered for threefold the verdict, $1,349,700, and attorneys' fees.

The court of appeals, necessarily confronting the issue of the legality of Texaco's sales to Dompier during the period Dompier was solely a wholesaler, affirmed (Petition Appendix A). Recognizing "that, generally, selling at different prices to customers who are at different levels of distribution will not constitute a violation of the Robinson-Patman Act" (PA-9), the court nevertheless ruled Texaco liable because Dompier had passed "at least a portion" of the wholesaler discount it received to its retailer customers (who competed with Hasbrouck), and the amount of the wholesaler discount was greater than Dompier's cost of wholesaling. PA-8-9. The court also concluded that since the wholesaler-retailer "price differential was substantial and . . . was in effect for several years," the *Morton Salt*[17] inference of competitive injury was applicable, leaving "little doubt that Texaco's pricing policy [selling at a uniform wholesaler price and a higher uniform retailer price] constituted price discrimination that was unlawful . . . ." PA-11-12. The court also upheld awarding damages on the premise that the retailers were entitled to price parity with the wholesaler (rather than the wholesaler's retailer-customers) and that "postulating the elimination of the [wholesaler-retailer] price differential, either by increasing the favored buyer's price, decreasing the disfavored buyer's price, or a combination of the two," was appropriate. PA-16.

17 FTC v. Morton Salt Co., 334 U.S. 37 (1948).

SUMMARY OF ARGUMENT

A. It has been universally recognized by the courts, the enforcement agencies and the commentators, that a supplier who sells to retailers at a uniform retailer price and to wholesalers at a uniform lower wholesaler price, fully complies with the Robinson-Patman Act, 15 U.S.C. § 13(a), and has no duty to police the resale prices of its independent customers or monitor, and base discounts upon, their costs.

The decision below, holding a supplier liable for *not* discriminating in price among its wholesalers[18] and imposing treble-damage liability on it for injuries caused by the decisions of an independent wholesaler and its independent retailer-customers to lower their own resale prices, departs from established precedent, from practicality, and from Congressional intent. Its rule of law would multiply distribution costs, rigidify and increase consumer prices, encourage resale price maintenance in violation of the Sherman Act, 15 U.S.C. § 1, and jeopardize the businesses of wholesalers.

B. During the years Dompier functioned solely as a wholesaler, it was not on the same functional level as plaintiff retailers and did not compete with them. The *Morton Salt* "self-evident"[19] inference of competitive injury from long-standing and significant price differences to purchasers *competing at the same level of trade*, is hardly "self-evident" when applied to purchasers at *different* levels of trade, where different prices are required. However, in the district court, the jury was instructed to treat the wholesaler as a *competitor* of plain-

18 The court of appeals took the position that while a supplier that sells to all wholesalers at a uniform price is insulated from price discrimination claims by any wholesaler, treating wholesalers equally can violate the Robinson-Patman Act if the plaintiff is a retailer. Under the Ninth Circuit view, if the plaintiff is a retailer, the supplier may be guilty of unlawful price discrimination unless the supplier can show it discriminated in its prices among wholesalers on the basis of each wholesaler's varying costs of doing business. PA-7-10.

19 *Morton Salt*, *supra*, 334 U.S. at 50.

tiff retailers by attributing to the wholesaler the functional level of its retailer customers.[20]

The court of appeals more directly held the Act's injury-to-competition requirement satisfied by sales over time to wholesalers at substantially lower prices than retailers.[21] Respectfully, injury to competition cannot be presumed from price differences to different distributional levels.

C. When Dompier was solely a wholesaler, antitrust injury allegedly flowed from decisions of some Dompier independent retailer customers to pass along to the public some part of whatever portion of Dompier's wholesalers' discount Dompier independently decided to pass along to them from time to time. Absent their independent decisions, there would have been no violation or claim of antitrust injury.

Assuming Texaco is legally responsible for these various decisions that it could not lawfully control and in which it did not participate, the appropriate damage inquiry would be how much better off would plaintiffs have been had their competitors, Dompier's customers, not received the discounts from Dompier and not used them competitively. Instead, plaintiffs quantified damages on a basis having no relationship to the decisions of Dompier and its customers or to any right to equal treatment with their competitors, Dompier's retailer customers.

20 Jury Instruction No. 23(A) provided:

> "In order for a non-favored and favored purchaser (*or its customer*) to be *in competition with each other*, the non-favored and the favored purchaser (*or its customer*) must be on the same functional level (retailer-retailer, or wholesaler-wholesaler).
>
> You the jury, as the sole judges of the fact must determine whether Dompier and/or Gull (*or their customers*) were on the same functional level as the plaintiffs." JA 399, (emphasis added).

21 "It is undisputed that a price differential existed between the rate Texaco charged Hasbrouck [the retailer] and the rate it charged Dompier and Gull [the wholesalers]. Furthermore, there was evidence that the price differential was substantial and that it was in effect for several years. There can be little doubt that Texaco's pricing policy constituted price discrimination that was unlawful unless it could be justified under the Act." PA-11-12.

Plaintiffs grounded damages on the notion they were entitled to more than their competitors: to equal treatment with the wholesalers. Nor did they limit themselves to how much better off they would have been had Dompier not received 100% of its discount. They also sought and obtained an award based on how much better off they, as retailers, would have been had they received the entire wholesaler discount. Such amounts are not "antitrust damages" within this Court's teachings in *Brunswick*[22] and *J. Truett Payne*[23] and, instead, would represent a price discrimination in plaintiffs' favor.

ARGUMENT

I. It is Not Illegal for a Supplier to Sell to Wholesalers at a Uniform Wholesaler Price Lower than Its Price to Retailers

A. Fundamental Commercial Facts Compel Different Prices to Different Classes of Trade That Are Not Based On Just Enabling Wholesalers or Retailers to Recover Their Costs

Anyone in the business of selling to retailers must be able to buy for less than he or she sells. In short, wholesalers *must* get a lower price than retailers. If they cannot, there will be no wholesalers. In addition, the margin between the buying price and selling price *must* be sufficiently large to satisfy the wholesaler that it is in the right business—that the potential exists not only to recover expenses but also to earn a satisfactory profit, making the risks, investment and effort worthwhile.

Thus, prices to the members of any class of trade (retail or wholesale) must necessarily do more than cover costs; they must enable the retailer or wholesaler to earn a satisfactory profit. Otherwise, they would not continue to sell the manufacturer's product. In a competitive economy, each retailer and wholesaler determines for itself how best to maximize its profit: when

22 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

23 J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981).

to increase its margin and when to cut it in the hope of adding sales; when to reduce expenditures and when to gamble on expanding them. Because decision-making and situations vary, it would be a remarkable coincidence for any two members of a class of trade paying the same price for a product to end up with the same costs and profits.

It is in the light of these fundamental commercial facts (which hardly would have come as a surprise to Congress) that the present issue should be evaluated.

B. The Courts and Enforcement Agencies Have Consistently Recognized the Legality of Selling To Wholesalers At Lower Prices Than Retailers

Throughout the history of the Robinson-Patman Act, it has been recognized that wholesalers require lower prices than retailers (to enable them to perform their function of reselling to retailers at a profit) and that compliance with the Act is assured by selling to all purchasers in the wholesaler class of trade at a uniform price that is not higher than the price to retailers. This is exemplified by the Order affirmed in pertinent part by this Court in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), which prohibited different prices among wholesalers and among retailers, but allowed different pricing between the two levels of trade so long as retailers were not charged less than wholesalers.[24]

24 "The prohibiting paragraphs of the order were:

'a) By selling such products to some wholesalers thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers.

'b) By selling such products to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such retailers.

(footnote continued)

This Court, in *FTC* v. *Sun Oil Co.*, 371 U.S. 505 (1963), succinctly summarized Congressional intention in enacting the Robinson-Patman Act:

> "In short, Congress intended to assure, to the extent reasonably practicable, that businessmen *at the same functional level* would start on equal competitive footing so far as price is concerned." 371 U.S. at 520 (emphasis added).[25]

It has always been fundamental that businesses at higher functional levels could, and necessarily would, start at lower price footings.[26] Responding to the obvious importance of having a clear demarcation line between the lawful and the unlawful to permit normal structuring of distribution arrangements, the Federal Trade Commission (the agency with principal responsibility for Robinson-Patman enforcement) has firmly drawn such a line—so long as a wholesaler is acting as a wholesaler (*i.e.*, selling to retailers):

> "the difference in the prices that the wholesaler and the retailer pay *cannot support* a claim of secondary line competitive injury under the Act." (emphasis added).[27]

'c) By selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer.' " 334 U.S. at 51 n.19.

25 *See also* Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 12 (1976) ("focus of Robinson-Patman is on competition 'at the same functional level' ").

26 "[T]he competitive effects requirement permits a supplier to quote different prices between different distributor classes—so long as those who are higher up (nearer the supplier) on the distribution ladder pay *less* than those who are further down (nearer the consumer)." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 174 (1962) (emphasis in original).

27 Boise Cascade Corp., [1983-87 FTC Complaints and Orders Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,330 at p. 23,394 (1986). In reversing the Commission's expansive view of the competitive injury standard, the Court of Appeals cast no doubt on the above. Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988).

The Justice Department has also affirmed the legality of functional level discounts to wholesalers:

> "The Robinson-Patman Act permits such discounts as long as each businessman performing a particular function gets the same discount for the performance of such function, and so long as the discount reflects the purchasers' relative positions in the chain." U.S. Dep't of Justice, *Report on the Robinson-Patman Act* 84 (1977).

The lower courts too have repeatedly emphasized the necessity of " 'a sale to two different buyers on the same functional level of competition, charging different prices to each.' "[28]

C. The Lower Court's Newly Minted Standards Are Without Warrant And Cannot Lawfully or Feasibly Be Met: Prices to Wholesalers Cannot be Cost-Based, And Suppliers Cannot Prevent Independent Wholesalers And Retailers From Reducing Prices

Explicitly rejecting the legal certainty (PA-9) that has enabled manufacturers to distribute products through wholesalers and retailers throughout the decades,[29] the court of appeals estab-

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28 Burns v. Reynolds Metals Co., 1988-2 Trade Cas. (CCH) ¶ 68,317 at 59,817 (6th Cir. 1988), *quoting* Eximco, Inc. v. Trane Co., 737 F.2d 505, 515 (5th Cir. 1984). *See also*, with respect to the clear legality of selling to wholesalers at less than to retailers, White Indus., Inc. v. Cessna Aircraft Co., 845 F.2d 1497, 1500 (8th Cir.), *cert. denied*, 109 S. Ct. 146 (1988); Edward J. Sweeney & Sons, Inc. v. Texaco Inc., 637 F.2d 105, 120-22 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); M.C. Mfg. Co., Inc. v. Texas Foundaries, Inc., 517 F.2d 1059, 1066 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976).

29 *See, e.g.*, Mennen Co. v. FTC, 288 Fed. 774, 781-82 (2d Cir.), *cert. denied*, 262 U.S. 759 (1923):

> "[The manufacturer] did not discriminate as between retailers but sold to all retailers on one and the same scale of prices. And it did not discriminate as between wholesalers but sold to all wholesalers on one and the same scale of prices. There is nothing unfair in declining to sell to retailers on the same scale of prices that it

lished a rule of deliberate uncertainty. A supplier could not know until suit and trial whether its sales to wholesalers had been lawful because legality would depend upon what the supplier could neither know at the time of sale nor control—each wholesaler's "costs" and independent pricing decisions.

1. Wholesaler Costs

a. Where buyers are members of different classes of trade (retail and wholesale), their costs simply are not relevant to the prices they pay. An expensively-located retailer easily may have greater costs than its wholesaler working out of a shed in a run-down neighborhood. But the wholesaler will pay less because a lower price is essential to permit the business on the higher level (wholesaler) to sell to the lower level (retailer) and to want to do so.[30] For a supplier, before accepting orders, to have to measure the costs of the various customers to which it sells and adjust prices accordingly, would be a pointless, astronomically-expensive exercise—if it could be done at all (which it cannot).

b. A rule requiring calibration of prices to wholesalers on the basis of each wholesaler's costs of wholesaling is patently

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sold to wholesalers, even though the retailers bought or sought to buy the same quantity the wholesalers bought.

• • •

Whether a buyer is a wholesaler or not does not depend upon the quantity he buys. It is not the character of his buying, but the character of his selling, which marks him as a wholesaler . . . . A wholesaler does not sell to the ultimate consumer, but to a 'jobber' or to a 'retailer.' "

Mennen was disapproved on a different issue in George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245, 254 (1929). On the legality of selling to wholesalers and retailers at different prices, it was unquestioned.

30 Pricing to different classes of trade is thus wholly distinguishable from attempts to justify different prices *within* the same class of trade on the basis of the cost of a special function undertaken by a member of the class. Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1132 (D.C. Cir. 1988). Both situations are sometimes loosely referred to as "functional discounts," accounting for much confusion.

impracticable. These are costs which a supplier cannot be expected to know and which will vary from wholesaler to wholesaler and day to day.[31]

c. It is legal to sell to wholesalers for less than to retailers without regard to their costs:

(i) First, because it is necessary if there are to be wholesalers, and Congress—fully understanding that wholesalers were paying less than retailers[32]—plainly did not intend that the Robinson-Patman Act destroy them;[33]

(ii) Second, while the Court has held "price discrimination" to mean no more than "price difference" in the context of a primary-line claim (geographic price differences injurious to *competitors of the seller*),[34] the Court observed that the legislative history suggested another meaning in the context of secondary-line claims (those by *purchasers* from the seller). Thus, it observed that Representative Utterbach (a manager of the Conference Bill which became § 2(a)):

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31 As an independent business, each wholesaler makes its own decision about where to locate its facilities, what kinds of equipment to purchase and when to upgrade, what number and types of employees to hire and how best to compensate them, whether and how much to borrow, and where and when, what strategies to pursue to attract and retain customers, what amount of credit to extend to which customers, what time, effort and money to expend in helping its customers be successful, what products to handle, what size inventories to maintain of each, how frequently to make deliveries, and myriads of other matters—each of which can significantly impact cost.

32 ". . . to suppress such differentials would produce an unwarranted disturbance of existing habits of trade." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 9 (1936). National Recovery Administration codes in effect from 1933 to 1935 set minimum discounts manufacturers were *required* to grant wholesalers. *See* U.S. Dep't of Justice, *Report on the Robinson-Patman Act* 108-09 (1977).

33 To the contrary, Congress intended the statute to protect wholesalers. *See* U.S. Dep't of Justice, *Report on the Robinson-Patman Act* 124, 137 (1977).

34 FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960).

> "declared that 'a discrimination is more than a mere difference,' and exists only when there is 'some relationship . . . between the parties to the discrimination which entitles them to equal treatment.' Such a relationship would prevail among competing purchasers . . . ."[35]

The Court noted:

> "It is, of course, possible that the Congressman was so intent upon the immediate problem—protection of secondary-line competition—that he did not reflect upon the significance of his statement when applied to primary-line cases."[36]

And, as the Court explained:

> "The existence of *competition among buyers* who are charged different prices by a seller *is obviously important* in terms of adverse effect upon secondary-line competition, but it would be merely a fortuitous circumstance so far as injury to primary-line competition is concerned."[37]

Selling to pure wholesalers for less than retailers simply is not discriminatory;[38]

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35 *Anheuser-Busch*, *supra*, 363 U.S. at 547.

36 *Id.* at 553 n.24.

37 *Id.* at 546 (emphasis added).

38 Needless to say, this does not mean a supplier can cavalierly label competing buyers "wholesaler" and "retailer" and discriminate between them. However, if in fact the purchasers are on different levels of trade and do not compete, that is the end of the inquiry. FTC v. Ruberoid Co., 343 U.S. 470, 475 (1952). What the wholesaler charges its retailers is entirely the wholesaler's business, except where the supplier controls the distributor or its prices to its customers. Only in that event is the supplier "chargeable with the competitive effects of [its] distributors' prices . . . ." Purolator Products, Inc., 65 F.T.C. 8, 36 (1964), *aff'd*, Purolator Products, Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968). As explained by leading commentators:

> ". . . if the middleman is entirely independent of control by the manufacturer, the prices it charges are not 'attributed' to the manufacturer, and there is no violation of the Act." Handler, Blake, Pitofsky & Goldschmid, *Cases and Materials on Trade Regulation* 1198 (2d ed. 1983).

(iii) Thirdly, where different prices are paid by purchasers reselling to different levels of trade (retailers reselling to consumers; wholesalers reselling to retailers), the requisite anticompetitive *effects* (assuming there are any) do not flow from the price difference;

(iv) And, in all events, a *bona fide* wholesaler who receives the same wholesaler price given by its supplier to all its wholesalers, is not someone who "knowingly receives the benefit of [a] discrimination" as specified in Section 2(a)—particularly where it is only after receipt, and on the basis of the wholesaler's subsequent resale pricing decisions and those of its customers, that assertions of competitive injury are made.

d. Nor may the future contemplated by the court of appeals be imputed to Congress:

- Sellers to one or more classes of trade monitor their customers' costs and resale prices and vary prices or discounts *within* a class of trade so as to prevent resale price reductions that might injure some member of a price reducer's own or its customers' class of trade;
- Sellers, becoming aware that a customer has reduced its resale prices to one or more of its own customers, promptly withdraw enough of the discount to prevent any repetition; and
- Federal courts are the forum for assessing the margin or level of profit sufficient to encourage the members of each class of trade to continue to distribute each manufacturer's products and still enable the manufacturer to be profitable.

Plainly, Congress intended no such regime. Determining what the appropriate "spread" should be between each class of trade has been left to the day-to-day judgment and negotiations of the businesses involved and the marketplace.

e. Nothing in the Robinson-Patman Act requires discrimination *within* any class of trade (retail or wholesale) on the basis of members' costs:

"The Robinson-Patman Act proscribes discriminatory pricing, not pricing which fails to discriminate between [purchasers] with unequal costs at the same level of distribution." *White Indus., Inc.* v. *Cessna Aircraft Co.*, *supra*, 845 F.2d at 1500 n.4.[39]

f. Discriminating among members of a class of trade on the basis of members' costs would penalize efficiency. To be sure, members of a class of trade who can reduce costs may enjoy advantages over competition and may be able to reduce prices to customers, giving the customers a competitive advantage at the customers' level of trade. That should hardly be discouraged.[40]

g. Discriminating within a class of trade against wholesalers (or retailers) on the basis of "costs" could subject a supplier to Robinson-Patman Act liability to those discriminated against.[41]

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39 In *White*, the dealer urged, *inter alia*, that lower prices to distributors were discriminatory because they impaired a dealer's ability to sell to other dealers in competition with distributors. In rejecting this claim, the court observed:

"Dealers like White who desire to compete in selling to *other dealers* will of course suffer a cost disadvantage compared with distributors, but to hold that the larger distributors' discount violates § 2(a) in this circumstance would effectively abolish two-channel distribution systems in all industries. White cites no authority for this extraordinary interpretation of the Act, nor can we find any." 845 F.2d at 1500 (emphasis in original).

40 Surely, it cannot be contemplated that a supplier have to write Distributor A:

"Our spy advises you have brilliantly restructured your sales staff and delivery system, reducing costs by 15%. Accordingly you will now be charged an additional 15% on your purchases."

And write Distributor B:

"We are in receipt of your affidavit attesting to the addition of another 10 worthless relatives to your payroll. An extra discount will be reflected in your next invoice."

41 *See, e.g.*, Mueller Co. v. FTC, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964) (cost based price differences within same level of trade are discriminatory). This Court has had occasion to suggest that a supplier should not, to avoid one possible Robinson-Patman Act concern, become "exposed . . . to new Robinson-Patman Act claims . . . ." Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 452 n.18 (1983).

2. Preventing Independent Wholesalers and Their Retailer Customers From Passing On Lower Prices to the Public

a. The court of appeals seemingly reasoned that because Texaco did not *in fact* determine its customers' resale prices "since the antitrust laws do not permit sellers to dictate the resale prices charged by their customers," Texaco is liable for the "independent pricing decisions" made by Dompier and Dompier's customers "*as a matter of law.*"[42] Respectfully, none of the cases relied upon in support of this position supports it. None involved the claim that lower prices to wholesalers than retailers would violate the Act—so none addressed the present issue: whether a *lawful* discount given all wholesalers *becomes unlawful* solely because of the independent pricing decisions of a wholesaler and its independent retailers. No case has so held. All the law, as shown above, is to the contrary.

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42 PA-15 n.8. The court's reasoning, in full text, is as follows:

"We note that, in any event, at least two of the three 'intervening causes' referred to by Texaco—the facts that Dompier and Gull made independent pricing decisions, and that their customers did so—are inadequate as a matter of law. In essence, Texaco argues that a defendant may avoid Robinson-Patman liability simply by showing that the recipients of the unlawful discount, or their customers, independently set their resale prices. That view would preclude all Robinson-Patman claims involving secondary and tertiary line injury, since the antitrust laws do not permit sellers to dictate the resale prices charged by their customers. *E.g.*, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102-03 (1980). Texaco's argument is directly contradicted by a long line of Robinson-Patman cases that have found wholesalers liable for unlawful price discounts passed on to their customers. *E.g.*, Morton Salt, 334 U.S. at 37; Perkins v. Standard Oil, 395 U.S. at 642; Falls City, 460 U.S. at 428."

Morton Salt,[43] a Federal Trade Commission proceeding, involved charges of discrimination within the same class of trade and where members of the lower level (retailers) paid less than wholesalers. As already noted, *supra* p. 17, the Order, affirmed by this Court, *explicitly sanctioned* Texaco's conduct here: selling to wholesalers at a uniform wholesale price and selling to retailers at a uniform retailer price that is higher.

Perkins[44] also involved discrimination within the same class of trade and where members of the lower level (retailers) paid less than the plaintiff integrated wholesaler. After discrimination between wholesalers was found, injury was traced through the majority-owned subsidiaries of the favored wholesaler to its impact upon plaintiff at the retail level. There is not the slightest suggestion that it is illegal to sell to all wholesalers at the same price.

Falls City[45] too involved discrimination on the same level of trade—between two wholesalers. The higher price charged the disfavored wholesaler made it impossible for its retailers to compete with the favored wholesaler's retailers. Again, there is no suggestion that selling to wholesalers at a uniform price could become illegal if a wholesaler receiving a nondiscriminatory price should decide to reduce prices to its customers.

The fact that Texaco believed it could not lawfully interfere with its independent wholesaler's pricing decisions or those of the wholesaler's independent retailers—and that it concededly did not interfere—cannot be a basis for imposing liability on Texaco for selling to its wholesalers at a uniform price and not discriminating among them.

b. The price at which Texaco sold Dompier when it was nothing but a wholesaler was a lawful price. So long as Dompier did not reduce its resale prices and its retail customers did not pass any portion of the reduction on to the public, there was

43 FTC v. Morton Salt Co., 334 U.S. 37 (1948).

44 Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

45 Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983).

no competitive injury to plaintiffs. *See supra* pp. 8-9. The issue of whether a supplier's sales at a lawful price become unlawful when, in the normal course, the recipient of the lower lawful price passes some of the benefit along to its customers, thereby causing injury to competition at the customer level, was addressed by this Court in the context of the meeting competition defense in *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951). The reasoning is dispositive.

First, in reconciling the Robinson-Patman Act with the Sherman and Clayton Acts, the Court observed that "Congress did not seek by the Robinson-Patman Act . . . to abolish competition. . . ." 340 U.S. at 249. It then held that the lawful price obtained by Standard's gasoline "jobbers" (by reason of Standard's meeting competition defense) did not become unlawful

> ". . . merely because it also appears that the beneficiaries of the seller's price reductions may derive a competitive advantage from them or may, *in a natural course of events, reduce their own resale prices to their customers*. It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level *as well as at the dealer's resale level*, whether or not the reduction to the dealer is discriminatory. * * * * We may, therefore, conclude that *Congress meant to permit the natural consequences to follow* the seller's action . . . ." 340 U.S. at 250 (emphasis added).

Here too, where an independent wholesaler in the natural course used a lawful nondiscriminatory price to reduce its own resale price to its customers,[46] it must be concluded that Congress meant to permit the natural consequences to follow.

c. Since suppliers cannot control their customers' resale prices as a matter of law, and cannot discriminate on the basis

46 The observation in F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 201 (1962) is apt:

> "For *any* lower price in favor of a distributor *always* creates a *capacity* to 'pass it on' and underprice the supplier (or other distributors) in resales to the 'retailer' level." (emphasis in original).

of customers' costs as a matter of law and fact, what alternative to ongoing massive liabilities (particularly if, as below, suing retailers obtain equality with wholesalers, threefold) is there? It does not seem far-fetched to expect that many wholesalers, in an attempt to fend off termination, will seek to assure their suppliers that they will not price aggressively in the future. However understandable, the public interest is not served by such a prospect.[47]

II. The Fact That Wholesalers Have Been Charged Less than Retailers for a Long Time Does Not Warrant an Inference That Competition Has Thereby Been Lessened

The point need not be labored. Parties and witnesses were in agreement that the retail gasoline market in Spokane remained vigorously competitive throughout the more than nine years that plaintiffs were claiming competition was lessened. Nevertheless, the courts below found it appropriate for a lessening of competition to be inferred by the jury from the fact that the wholesaler price, as must be expected, was significantly lower than the retailer price for many years. PA-11-12. Plainly, this was a misapplication of *Morton Salt*'s "self-evident" inference.

47 The principle was reiterated in Great Atlantic & Pacific Tea Co., Inc. v. FTC, 440 U.S. 69, 80 (1979):

> "In the *Automatic Canteen* case, the Court warned against interpretations of the Robinson-Patman Act which 'extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.' 346 U.S., at 63. Imposition of . . . liability on the petitioner in this case would lead to just such price uniformity and rigidity.[13]
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> • • •
>
> [13] More than once the Court has stated that the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws. *United States v. United States Gypsum Co.*, 438 U.S. 422; *Automatic Canteen Co. of America v. FTC*, *supra* at 74."

334 U.S. at 50. The Act's requirements for proof of injury to competition must not be trivialized.[48]

III. In No Event May Retailers Predicate Competitive Injury and Treble Damages on the Basis of How Much Better Off They Would Have Been Had They Been Treated As Wholesalers

A. Absence of Actual Competitive Injury

Plaintiffs did not merely challenge an age-old practice consistently considered lawful—selling to all wholesalers at a uniform wholesaler price—they sought to recover treble damages therefor under Section 4 of the Clayton Act as conduct "forbidden in the antitrust laws." 15 U.S. § 15(a). As such, it was essential for plaintiffs to demonstrate that the practice actually injured competition,[49] not just plaintiffs. But with competition in Spokane thriving, there could be no serious attempt to do so. The district court refused to charge that plaintiffs had to prove an actual impact upon competition to recover damages (R. 3121-22), and the jury was instructed that plaintiffs were *not* required to establish that the alleged discrimination in price actually injured competition. JA 396-97.[50] The court of

48 As a leading commentator on the Act observed, a "focus on detrimental effects on competition, rather than a concern with individual competitors, is fundamental to a reconciliation of the Robinson-Patman Act with over-all antitrust policies." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 130 (1962).

49 This Court cautioned in FTC v. Sun Oil Co., 371 U.S. 505, 527 (1963):

> "In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission *and the courts must make realistic appraisals of relevant competitive facts*. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis." (emphasis added).

50 This error alone is sufficient to warrant reversal. *See, e.g.*, Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 670 F.2d 575, 577 (Former 5th Cir.), *cert. denied*, 459 U.S. 908 (1982); O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1127-28 (1976).

appeals, disparaging as a "chestnut" (PA-10) this Court's repeated admonition that the antitrust laws in the context of Clayton Act § 4, were "for 'the protection of *competition*, not *competitors*,' "[51] concurred in plaintiffs' focusing on themselves, not competition. PA-12-15.

B. Damages Were Not Predicated On That Which Allegedly Made The Conduct Unlawful

Plaintiff retailers sought damages on the basis of the windfall profits they would have made had Texaco been ordered to treat them as a wholesaler. *See supra* pp. 9-11. However, nothing in the antitrust laws—even as construed by the court of appeals in this case—requires identical pricing to wholesalers and retailers. As explained in comparable circumstances in *Brunswick*:

> ". . . it is far from clear that the loss of windfall profits that would have accrued . . . even constitutes 'injury' within the meaning of § 4. And it is quite clear that if respondents were injured, . . . it did not occur 'by reason of' that which made the [conduct] unlawful." 429 U.S. at 488.

What purportedly made Texaco's sales to a wholesaler at its uniform wholesaler price unlawful, under plaintiffs' own theory, was that some portion exceeded the wholesaler's costs and, at times, "some portion of the discount was passed along" to plaintiffs' competitors, who in turn passed along some part of that to the public, thereby causing plaintiffs to *suffer* loss of customers or reduction in their selling price. Assuming plaintiffs were entitled to damages, it would be limited to those flowing from such loss of customers or reductions in selling prices. It would not be the windfall of hypothetical equal treatment with a wholesaler.

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51 *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis in original).

C. Under No Circumstances Should "Damages" Have Been Projected On The Basis Of Plaintiffs' Receiving All or Part of The Wholesaler Discount

Of the three equal-treatment-with-Dompier scenarios, two were based on plaintiffs' receiving all or half the wholesaler discount. *See supra* pp. 10-11. In a price discrimination claim, however, as Justice Cardozo explained in an analogous context:

> "The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less."[52]

Thus, in *J. Truett Payne*,[53] the Court rejected the notion that a disfavored purchaser is entitled to recover, as "automatic damages," the amount of the price differential giving rise to an unlawful discrimination—because a purchaser simply has no right to the lower price. Under the Act, there is no violation if the seller continues to sell at the same high price to the plaintiff, as long as it ceases to sell at a lower price to "favored" purchasers. Since there would be no violation under that circumstance, a price-discrimination plaintiff cannot claim that the antitrust laws give it the right to receive the discrimination.[54]

Moreover, here, where plaintiffs' damages are based on their receiving not the price paid by their *competitors*, Dompier's customers, but that paid by their competitors' supplier, Dompier, plaintiffs' "damages" actually amounted to a discriminatory preference for themselves. In no event may that be justified as "antitrust damages." *See, e.g., Rose Confections, Inc.* v. *Ambrosia Chocolate Co.*, 816 F.2d 381, 394 (8th Cir. 1987); *Olympia Co., Inc.* v. *Celotex Corp.*, 771 F.2d 888, 892 (5th Cir. 1985).

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52 ICC v. United States, 289 U.S. 385, 390 (1933).

53 J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981).

54 By the same token, it is the *lower* price to the "favored" buyer that a seller must justify for "meeting competition" purposes, not the higher price to the "disfavored" buyer, as this Court emphasized in *Falls City, supra*, 460 U.S. at 439 *et seq.*

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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